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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. ~~1111~~ 211

LANNOM MANUFACTURING CO., INC.,
*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,
*Respondent*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.**

JUDSON HARWOOD,
*515 Nashville Trust Building,*
*Nashville, Tennessee,*
*Attorney for Lannom Manufacturing Company.*

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*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.**

Petitioner, Lannom Manufacturing Co., Inc., a Tennessee Corporation, prays that the Writ of Certiorari issue to review a decision or order of the United States Court of Appeals for the Sixth Circuit, which held that members of the Executive Board of the International Fur and Leather Workers Union, the charging party in this case, were not required to file the affidavits required by Section 9(h) of the Labor Management Relations Act. The decision or order of the Court of Appeals was based primarily upon the fact that the members of the Executive Board were not specifically denominated as "officers" in the Union Constitution, although they clearly held positions identified as "offices". The Court of Appeals also held that one Irving Potash was not an "officer" required to file an affidavit

because he had surrendered his title of President of the Fur Division, even though he continued to perform the duties of such office and had surrendered the title solely for the purpose of avoiding the necessity of filing such affidavit, thereby permitting him to retain active membership in the Communist Party.

## Opinion Below

The opinion of the Court of Appeals was entered on the 8th day of April, 1957, and is copied in the Appendix hereto at page 19.

## Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

## Questions Presented

1. (a) Whether the members of the directing board of a Labor Union who are given full and complete governing powers by the Union Constitution must file the affidavit required under Section 9(h) of the Labor Management Relations Act.

(b) Whether the members of the governing board of a Labor Union who are vested with full and complete management and control under the Union Constitution are excused from filing the non-communist affidavits required under Section 9(h) of the Labor Management Relations Act merely because the Union Constitution does not designate such persons as "officers" when they clearly hold positions identified as "offices".

2. Whether a Labor Union is in compliance with the requirements of Section 9(h) of the Act when it knowingly permits an "officer" to surrender his title but continue to fill the "office" when such action is taken solely for the purpose of evading the requirements of the Act.

## Statutes Involved

The applicable statute is Section 9(h) of the Labor Management Relations Act which provides:

> "(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officer of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits. July 5, 1935, C. 372, Sec. 9, 49 Stat. 453; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, Sec. 101, 61 Stat. 143; Oct. 2, 1951, c. 534, Sec. 1 (c, d), 65 Stat. 601."

## Statement of the Case

The National Labor Relations Board filed its Petition for enforcement of an unfair labor practice order issued against Petitioner. The Petitioner herein moved to dismiss said Petition on the ground that the charging union was not in compliance with Section 9(h) of the Labor Management Relations Act, Section 159-H, Title 29, U. S. C. A.,

which requires the filing of non-communist affidavits by each officer of such labor organization, in that its president was affiliated with the Communist party, that his affidavit to the contrary which he filed with the Board was false, and that he had been convicted of perjury for having filed such false affidavit. The Court of Appeals sustained the motion to dismiss. *N. L. R. B* v. *Lannom Manufacturing Company*, 226 F.(2d) 194, C. A. 6th. This ruling was reversed by this Court on the ground that "the sole sanction for the filing of a false affidavit under Section 9(h) is the criminal penalty imposed on the officer who files a false affidavit, not decompliance of the union or the withholding of the benefits of the Act that are granted once the specified officers file their Section 9(h) affidavits." *Amalgamated Meat Cutters, etc.* v. *N.L.R.B.*, 352 U. S. 153.

On the remand of the case to the Court of Appeals, the Petitioner filed a motion to remand the proceedings to the Board on the ground that the Board erroneously rejected Petitioner's offer of evidence showing that Irving Potash, a Vice-President of the Union, had not in fact filed the required affidavit. The offer of proof clearly shows that Potash was an active member of the Communist Party and rather than surrender his membership in the Communist Party and file the necessary affidavit, he gave up his title but retained his office and continued to perform exactly the same duties. The Board opposed this motion relying upon facts which did not appear in the record in the case and, in order for the facts to be before the Court without dispute, the Petitioner filed a supplemental motion to remand the case to the Board on the ground that there was noncompliance with Section 9(h) because (1) Article V of the Union's Constitution, a copy of which was annexed to the motion, provides for an International Executive Board and a Directing Committee of the International Executive

Board, the members of which had failed to file the required affidavits; and (2) Article VI of the Constitution provides for the position of Division President of the Fur Division and that Potash was actually the President of the Fur Division, instead of Vice-President, as shown in the offer of proof and that he gave up this title rather than file the required affidavit.

The Board while opposing the supplemental motion, admitted the existence and correctness of the Union Constitution as exhibited to the motion and also admitted that the members of the International Executive Board and the Directing Committee of the International Executive Board did not file affidavits. The Board's reply to said supplemental motion listed the names of all persons who had filed affidavits, no one of which was Potash. The Board's reply showed that Ben Gold as President of the International Union and also as President of the Fur Division filed the affidavit and admits that Potash did not file.

After the Board filed its response admitting the facts, the Petitioner filed an alternative motion to dismiss the Board's enforcement petition on the grounds that the admitted facts show, without dispute, that a large number of persons occupying positions identified as "offices", namely, members of the International Executive Board and its Directing Committee, failed to file the required affidavits.

The Court of Appeals overruled all of the motions on the ground that the members of the Executive Board, as well as Potash, were not "officers", basing its decision primarily upon what Petitioner considers a misinterpretation of this Court's decision in the case of *N. L. R. B. v. Coca Cola Bottling Company*, 350 U.S. 264. The Court of Appeals also endeavored to distinguish this case from the facts in the case of *Goodman Manufacturing Co. v. N. L. R. B.*, 234, F. 2d, 775, C.A. 7, certiorari denied, 352 U.S.

872. It is the insistence of the Petitioner herein that this Court has never held, or intended to hold, that only those persons whose titles were denominated as "officers" are required to file affidavits but, on the contrary, has expressly held that all persons holding position identified as "offices" must file said affidavits, and that in the instant case the Union Constitution creates "offices" even though it expressly refrains from designating as "officers" the persons who fill said "offices".

## Reasons for Granting the Writ

1. The decision of the Court of Appeals in this case is in conflict with the decision of the Court of Appeals in the case of *Goodman Manufacturing Co. v. N. L. R. B.*, 234 F. 2d, 775 (Court of Appeals for Seventh Circuit), certiorari denied, 352 U.S., 872. In the Goodman case the Court of Appeals for the Seventh Circuit held that Trustees of the International Union involved in that case occupied positions identified as "offices", and were required to file the Section 9(h) affidavits. The ruling of the Court of Appeals in the Goodman case was made after this Court's decision in the Coca-Cola Bottling Company case. In the Goodman case the Constitution vested all the facets of management and control in the Board of Trustees. In this case the Union Constitution gave practically identical authority and power to what is denominated as the Executive Board. Certainly Congress never intended that the Directing Board of one International Union be required to file the affidavits without requiring the affidavits from the members of the Directing Board of all International Unions.

2. The decision of the Court of Appeals misconstrues and is in conflict with this Court's decision in the case of *N. L. R. B.* v. *Coca-Cola Bottling Company*, 350 U.S. 264. In the Coca-Cola case this Court approved the Board's definition of the terms "officer" as "any person occupying

a position identified as an office in the Constitution of the labor organization." The Court of Appeals based its decision largely upon the fact that the Union Constitution, listing "officers", did not include members of the Executive Board, although the Union Constitution clearly creates the "office" of Executive Board member.

## Argument

Article V of the Constitution of the Union provides for an International Executive Board and sets out in great detail the duties of such Board. Section 12 of Article V provides for a Directing Committee of the International Executive Board.

It is the insistence of the Petitioner herein that the members of said Executive Board and the members of the Directing Committee are officers within the meaning of Section 9(h) of the Act and having failed to file affidavits as required by said Act, the Union is not in compliance and is not entitled to the services of the National Labor Relations Board.

The Court of Appeals for the Seventh Circuit has had this identical question before it in the case of *Goodman Manufacturing Co.* v. *National Labor Relations Board*, 234 F. 2d 775. In the cited case, which was decided after this Court's decision in the *Louisville Coca-Cola* case, 350 U.S. 264, the Court analyzed in detail the Constitutional provisions with reference to Trustees and held that said Trustees are "officers" within the meaning of Section 9(h) of the Act and having failed to file the affidavit, the Union was not in compliance and thereupon the Petition of the Labor Board for enforcement was denied.

The Court in the Goodman case, at page 776, stated:

> " * * * It now appears definitely settled that non-compliance with Sec. 9(h) may in an appropriate case be raised as a defense to an unfair labor practice

complaint and that when so raised it is *jurisdictional*. N.L.R.B. v. Highland Park Mfg. Co., 341 U.S. 322, 325, 71 S. Ct. 758, 95 L. Ed. 969; N.L.R.B. v. Dant, 344 U.S. 375, 73 S. Ct. 375, 97 L. Ed. 407; N.L.R.B. v. Atlanta Metallic Casket Co., 5 Cir., 203 F. 2d 931. Thus we need not be concerned with other defenses raised by petitioner until and unless this jurisdictional issue is decided adversely to it."

Thereupon the Court proceeded to determine the question of whether the Trustees, as such, were officers within the meaning of the Act.

In reaching the conclusion that they were officers required to sign said affidavits, the Court at pages 778 and 779 stated:

"* * * It is true, of course, that "trustees" and "secretaries" are not specifically designated as officers, but it is provided that "trustees" shall be nominated and elected by the International convention."

"* * * Certainly, to use the Supreme Court's illustration, they are not 'boys in the back room or other agencies of invisible government'."

"* * * The specific requirement contained in Article 5, that the "trustees" be nominated and elected by the International convention at the same time and in the same manner that those designated as General Officers are elected, carries a strong connotation that the "trustees" are to be elected to an office."

Article 9 of the constitution provides:

"* * * The duties of the Trustees shall be to audit all books and records of the International Office quarterly, or by order of the General Executive Board; to take inventory at least once a year, and safeguard all the properties of the Union and make their report at the convention. * * *"

> "Article 10 of the Constitution in great detail sets forth the powers and duties of the General Executive Board. Such powers, as might be expected, relate to every facet of management and control of the International Union as well as its affiliated District Councils and Local Unions. Its power and authority encompass both the policy making and administrative fields."
>
> " * * * We are not here concerned with the performance of duties and functions but with the power of those asserted to be officers as fixed in the constitution of the International Union."

Applying the same general rules to the Executive Board members in the case now before this Court, it is found from an examination of the Constitution that all of the matters above quoted which were relied upon by the Court in the Goodman case are present in the case now before this Court as well as others.

For instance, Article III of the Constitution (page 9) provides:

> "The government of the International Union shall be vested in the membership, acting through the Biennial International Convention or through a referendum vote, and, between International Conventions, in the International Executive Board and the Directing Committee thereof acting as hereinafter provided."

Article IV (page 14) provides for the election of the International Executive Board and of International Officers by the International Convention.

Article V (page 17), dealing expressly with the International Executive Board, among other things, provides as follows:

> "Section 3. All International Executive Board mem-

bers shall be elected by the International Convention on the last day of the Convention.

"Section 10. The International Executive Board shall:

A. Enforce the Constitution and carry out the instructions of the International Convention and, between International Conventions, shall have the duty and power to govern and direct the affairs of the International Union.

B. Direct the acquisition and disposition and manner of holding, lease, mortgage, or transfer of real estate and property necessary to the affairs of the International Union.

C. Through the International President, grant charters to newly-organized Local Unions, Joint Boards, Joint Councils or District Councils and issue such charters in such localities and in such numbers as it shall deem necessary and advisable.

D. Have power to revoke or suspend the charter of any Local Union, Joint Board, Joint Council or District Council which is inactive or is guilty of any violation of the International Constitution, or of any resolution or decision of the International Convention, or which acts contrary to the policy established by the International Convention.

E. Have the right to designate certified public accountants to audit the books of any Local Union, Joint Board, Joint Council or District Council of the International Union, and such books shall be made available by such Local Unions, Joint Boards, Joint Councils or District Councils to such certified public accountants.

F. Have the right to obtain blanket insurance bonding for all officers or employees entrusted with the handling of funds by Local Unions, Joint Boards, Joint Councils, District Councils or the International Union

in the amount of bond deemed advisable, the proportionate cost of such bonding insurance to be borne by the respective Local Union, Joint Board, Joint Council, District Council or the International Union whose officers or employees are so insured.

G. Cause the books of the International Secretary-Treasurer to be audited at least semi-annually by a certified public accountant designated by it,

H. Fix the salaries of all officers and organizers of the International Union.

I. Supervise the conduct of all referenda provided for by this Constitution.

J. Fill vacancies caused by the death, resignation, suspension, removal, inability or refusal to act, or vacancy caused by any reason whatsoever, of an International Officer pending the election of his successor.

K. Fix rules and regulations governing the organization, chartering and functioning of Women's Auxiliaries; grant charters to Women's Auxiliaries in such localities and in such numbers as it shall deem necessary and advisable; encourage, assist and organize Women's Auxiliaries including the assignment of organizers for that purpose.

L. Have prior jurisdiction as a body of the whole or by a trial committee functioning under its direction and subject to its approval, after trial, to remove, expel, suspend or otherwise discipline any officer, organizer, business agent or representative of a Local Union, Joint Board, Joint Council or District Council for violation of this International Constitution and shall have sole jurisdiction to try and remove, expel, suspend or otherwise discipline the officers of the International Union or members of the International Executive Board."

Section 11 provides, in part:

"The International Executive Board and, under its authority, the International President, shall be empowered to employ organizers."

Section 12 provides as follows:

"The International Executive Board shall have power to designate a sub-committee of its membership representing both divisions to be known as the Directing Committee of the International Executive Board. Such Directing Committee shall meet upon call by the International President as often as the affairs of the International Union shall require or warrant, and shall have full power to govern and direct the affairs of the International Union between meetings of the International Executive Board. Full and complete minutes of the meetings of the Directing Committee shall be submitted promptly to all members of the International Executive Board, and all action taken or decisions of major importance made by the Directing Committee shall be subject to the approval of the International Executive Board."

Article VI, Section 5, in enumerating the power and duties of the President, among other things, provides:

"C. To interpret this Constitution, subject to review by the International Executive Board.

D. Have full power between sessions of the International Executive Board to direct the affairs of the International Union, subject to the approval of the International Executive Board.

F. Subject to the approval of the International Executive Board, to appoint, direct, suspend or remove such organizers, representatives, agents and employees

as he may deem necessary and to fix their compensation.

H. To report his actions and decisions to the International Executive Board."

Section 6, dealing with the duties of the International Secretary-Treasurer, among other things, provides:

"G. Subject to the approval of the International Executive Board, to employ such assistants as may be necessary to conduct the affairs of his office."

Article VIII, Section 9, dealing with Local Unions, provides:

"All funds and property of each Local Union shall be deemed held in trust for the benefit of its members in their collective capacity and shall be used only as provided for in this Constitution under the supervision of the International Executive Board."

There are a number of other provisions setting out in minute detail the powers and duties of the International Executive Board, but it is believed that the foregoing quotations are sufficient to establish conclusively that the members of said Board are in fact "officers", regardless of any specific title or designation.

The members of the International Executive Board are elected by the membership at the same time and in the same manner as other "officers" are elected and they exercise all of the facets of management and supervision and, as pointed out in the Goodman case and the decision of this Court in the Coca-Cola case, they are certainly not "boys in the back room or other agencies of invisible government".

As was the case of the Trustees in the Goodman case, the International Executive Board members are not specifi-

cally designated as "officers", but they are elected by the International Convention at the same time and in the same manner as those designated as "general officers" and, as stated by the Court in the Goodman case, this "carries a strong connotation that—(they) are to be elected to an office".

In discussing the recent decision of this Court in the Coca-Cola case, the Court, in the Goodman case, stated: "The Supreme Court in the Coca-Cola case stated (page 269) 'Officers normally mean those who hold defined offices'. Obviously this definition does not purport to be exclusive—".

Article IV, Section 10 of the Union Constitution, enumerates the order of business at the International Conventions, and Item 7 states: "Election of International Executive Board." Item 9 then states: "Installation of International Executive Board." These provisions, among all others, clearly show that these parties are elected to and installed in an "office". A holding that these parties are, therefore, required to file affidavits is entirely in accord with this Court's decision in the Coca-Cola case.

In many respects the members of this International Executive Board are comparable to Directors of a private corporation, and generally the Directors of a private corporation are "officers".

Cyclopedia Corporations by Fletcher, Volume 2, page 30, (Section 271) states:

> "In a broad sense, there is no doubt but that a director of a corporation is an officer thereof, and he is generally held to be embraced within the term 'officers' as used in statutes."

Volume 13, American Jurisprudence, page 854 (Corporations), Section 866, states:

"Rather, a director is a part of an elected body of officers constituting the executive representatives of the corporation."

In the case of *National Labor Relations Board* vs. *Highland Mfg. Co.*, 341 U.S. 322, at page 325, this Court stated:

"As the Court of Appeals for both the Fourth and Fifth Circuits has said, the congressional purpose was to 'wholly eradicate and bar from leadership in the American labor movement, at each and every level, adherents to the Communist party and believers in the unconstitutional overthrow of our Government.' 181 F. 2d 919, 920; 184 F. 2d 98, 101. It would require much clearer language of exemption to justify holding that the very top levels of influence and actual power in the labor movement in this country were untouched while only the lower levels were affected."

A rather detailed discussion of this overall question appears in 66 Yale Law Journal, No. 5 (April, 1957), beginning at page 771. This authority very strongly supports the Petitioner's contention herein and in so doing stated at page 773:

"An attempt to resolve conflicting decisions in the troubled area of compliance litigation, the Coca-Cola case has achieved its objective only partially. In its leading opinion after the Coca-Cola case, Desaulniers and Co., the NLRB reaffirmed its narrow view of the constitutional test. But interpreting the Supreme Court decision more liberally, the Seventh Circuit, requested to reexamine its broad view of the constitutional test, reiterated its earlier position that the term officer includes individuals whose offices the union constitution described. The Seventh Circuit's interpreta-

tion seems preferable to the Board's. It is not unreasonable to assume that persons whose positions are described in the union constitution are of sufficient importance to be designated officers under section 9(h). Nor does this broader approach raise any problems of difficult interpretation or proof for the Board or unions; in every instance a constitutional source is available on which to hinge decisions that compliance is necessary."

The offer of proof in this case clearly and conclusively shows that Irving Potash filled a position identified as an "office". The pertinent portions of the offer of proof in this regard was as follows:

. . . "Mr. Harwood: If the Examiner please, Mr. Hamilton has very kindly consented to a stipulation that will save the Examiner a lot of time and save the Respondent not only time but expense." . . .

"* * * On or about June 30, 1950, the International Fur and Leather Workers Union, through its central council, or whatever it may be, instructed all of its officers to sign non-communist affidavits in order to comply with the Taft Hartley Act."

". . . A. Mr. Irving Potash, at the meeting in June 1950, declined to surrender his card as a member of the communist party and prior to that time had been a vice-president of this union, and his activities were to supervise and in fact run and control the New York Furriers Joint Board. Rather than surrender his communist party, at that meeting, he gave up his title of vice-president, but that he retained his same job and performed the same duties; that he had been performing prior to giving up his title as a vice-president; . . ."

"Now, is that stipulation correct?

"Mr. Hamilton: That is correct. General Counsel is willing to stipulate that if this witness were called he would testify as outlined by Mr. Harwood, but by entering into the stipulation General Counsel is not waiving any objections which he would and does make as to the materiality, relevancy and competency, admissibility and anything else on this testimony."

"Trial Examiner Wilson: I will sustain his objection and allow the stipulation to stand as an offer of proof."

This offer of proof clearly shows that whatever position laying Potash held, whether it be Vice-President or President of the Fur Division, it was necessary for him to file the affidavit for the Union to be in compliance. The offer of proof further shows that he surrendered his title but continued to fill the "office", and this action was taken deliberately for the purpose of evading the requirements of Section 9(h) of the Act.

Certainly Congress did not intend to permit an ardent communist to fill an "office" without title, and thereby evade the filing requirements of the Act. Such a holding is contrary to this Court's decision in the Highland Park case above quoted.

## Conclusion

The fact that Article VI of the Union Constitution endeavors to limit or restrict the term "officer" by the use of the phrase "and no others", after describing certain positions, cannot in any way restrict or change the meaning of the word "officer" as used in the Act. To hold otherwise is to permit the Union, in effect, to amend the statute and certainly this was not the intent of Congress.

Petitioner most respectfully insists that this Court should grant this Petition and reverse the Court of Appeals.

Respectfully submitted,

JUDSON HARWOOD,
*515 Nashville Trust Building,*
*Nashville, Tennessee,*
*Attorneys for Lannom Manufacturing Company.*

Filed Apr. 8, 1957. Carl W. Reuss, Clerk

No. 12328

# UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

LANNOM MANUFACTURING COMPANY, Respondent

ON MOTION OF RESPONDENT TO REMAND CAUSE TO THE NATIONAL LABOR RELATIONS BOARD

Decided April 8, 1957

Before SIMONS, Chief Judge, MILLER and STEWART, Circuit Judges

MILLER, Circuit Judge:

The National Labor Relations Board seeks enforcement of its unfair labor practice order heretofore issued against the respondent, Lannom Manufacturing Company. The respondent moved to dismiss the petition on the ground that the charging union was not in compliance with Section 9(h) of the Labor Management Relations Act, Section 159-H, Title 29, U. S. C. A., which requires the filing of non-communist affidavits by each officer of such labor organization, in that its president was affiliated with the Communist party, that his affidavit to the contrary which he filed with the Board was false, and that he had been convicted of perjury for having filed such false affidavit. This Court sustained the motion to dismiss. *N. L. R. B.* v. *Lannom Manufacturing Company*, 226 F.(2d) 194, C. A. 6th. This ruling was reversed by the Supreme Court on the ground that "the sole sanction for the filing of a false affidavit under Section 9(h) is the criminal penalty imposed on the officer who files a false affidavit, not decompliance of the union or the withholding of the benefits of the Act that are granted once the specified officers file their Section 9(h) affidavits."

*Amalgamated Meat Cutters, etc. v. N. L. R. B.*, 352 U. S. 153.

On the return of the case to this Court, the respondent has filed a motion to remand the proceeding to the Board on the ground that the Board erroneously rejected respondent's offer of evidence showing that Irving Potash, a vice-president of the Union, had not in fact filed the required affidavit. The respondent contends that the evidence which it offered would have shown that Potash was a member of the Communist party and rather than surrender his membership in the Communist party and file the necessary affidavit, he gave up his title of vice-president but retained the same job and performed the same duties that he had been performing prior to giving up his title. The Board opposed this motion on the ground, among others, that since the Constitution of the Union did not list the office of International vice-president, no affidavit was required from the holder of that position.

Before this motion was ruled upon, respondent filed a supplemental motion to remand the case to the Board on the ground that there was non-complaince with Section 9(h) in the following respects: (1) Article V of the Union's 1950 Constitution, a copy of which was annexed to the motion, provides for an international Executive Board and a Directing Committee of the International Executive Board, the members of which had failed to file the required affidavits; (2) Article VI of the Constitution provides for the position of Division President of the Fur Division and that Potash was exercising the powers of that office without having filed an affidavit. It is contended that the members of the International Executive Board, its Directing Committee, and Potash are in fact "officers" of the Union, although not so designated by the Constitution.

Article V of the Constitution of the Union carries the title "International Executive Board." It provides, in part, as follows: "Section 1. The International Executive Board shall consist of thirty-eight (38) members, inclusive of the International Officers who shall be members by virtue of their office. . . . Section 3. All International Executive Board members shall be elected by the International Convention on the last day of the Convention. . . . Section 9.

The International Executive Board shall meet at least once every six months. Section 10. The International Executive Board shall: "A. Enforce the Constitution and carry out the instructions of the International Convention and, between International Conventions, shall have the duty and power to govern and direct the affairs of the International Union." Other paragraphs of Section 10 provide that the Executive Board shall direct the acquisition and disposition of the real estate and property of the Union, grant through the President charters to newly-organized Local Unions, revoke or suspend the charter of any Local Union for specified causes, designate accountants to audit the books of any Local Union, to cause the books of the International Secretary-Treasurer to be audited at least semi-annully, fix the salaries of all officers, and fill vacancies in the office of an International Officer pending the election of a successor. Section 12 provides in part: "The International Executive Board shall have power to designate a sub-committee of its membership representing both divisions to be known as the Directing Committee of the International Executive Board. Such Directing Committee shall meet upon call by the International President as often as the affairs of the International Union shall require or warrant, and shall have full power to govern and direct the affairs of the International Union between meetings of the International Union between meetings of the International Executive Board. . . ."

Article VI of the Constitution of the Union carries the title "International Officers." It reads, in part, as follows: "Section 1. The officers of the International Union shall be the International President, the International Secretary-Treasurer, and the President and Secretary-Treasurer of each Division, and no others. . . ."

The Board filed its Opposition to the supplemental motion, in which it admitted the existence and correctness of Articles V and VI of the Constitution of the Union as claimed by the respondent and that the members of the International Executive Board and the Directing Committee of the Executive Board listed in Article V did not file Section 9(h) affidavits except insofar as any one of them was also an International officer. It also stated that Section

9(h) affidavits were filed by each International officer listed in Article VI of the Constitution, namely, International President, International Secretary-Treasurer, President of the Fur Workers Division, Secretary-Treasurer of the Fur Workers Division, President of the Leather Division, and Secretary-Treasurer of the Leather Division. It also gave the names of these officers, no one of which was Potash.

Respondent thereupon filed its alternate motion to dismiss the petition on the ground that from the admissions contained in the Board's Opposition to respondent's supplemental motion to remand, it was shown without dispute that a large number of persons occupying positions identified as officers, namely, the members of the International Executive Board and its Directing Committee, failed to file the affidavits required by Section 9(h) of the Act.

As a preliminary question, it is the Board's position that the respondent's present contention goes beyond its original offer of proof before the Board, which merely alleged that the affidavit of the Union's president was false and that Potash was a "concealed" International vice-president. It is contended that consideration of the question by this Court is barred by Section 10(e) of the Act; that even if not barred by Section 10(e), the question sought to be raised by respondent may not properly be litigated in an unfair labor practice proceeding. *N. L. R. B.* v. *Vulcan Forging Co.*, 188 F.(2d) 927, 929-930, C. A. 6th; *N. L. R. B.* v. *Sharples Chemicals, Inc.*, 209 F.(2d) 645, 650, C. A. 6th. If the motions involved the taking of proof upon a factual issue and a ruling upon the issue, the Board's contention would have merit. However, upon the basis of the facts admitted by the Board, respondent's motions raise a jurisdictional question, which can be decided as a matter of law upon undisputed facts, and should be considered by the Court at this stage of the proceedings. *N. L. R. B.* v. *Highland Park Manufacturing Co.*, 341 U. S. 322, 325; *N. L. R. B.* v. *Dant & Russell, Ltd.*, 344 U. S. 375; *N. L. R. B.* v. *Coca-Cola Bottling Co. v. Louisville, Inc.*, 350 U. S. 264, 267-268. *Goodman Manufacturing Co.* v. *N. L. R. B.*, 234 F.(2d) 775, 776, C. A. 7th, cert. denied, 352 U. S. 872.

On the undisputed facts before us Potash was not one of those designated as officers by the Constitution. Nor, did

the Constitution at any place state that the members of the International Executive Board and its Directing Committee were officers of the Union. Article VI, by the use of the words "and no others" expressly excludes them from its "officers." The question presented is whether those facts are controlling in the matter, or can we look into the scope of activities of these various persons and the powers and duties conferred upon them by the Constitution and conclude that they are in fact "officers" of the Union by the application of the functional test, although they are not "officers" in the constitutional sense. This question was considered by the Supreme Court in *N. L. R. B.* v. *Coca-Cola Bottling Co.*, *supra*, 350 U. S. 264, 268-269, in which it ruled that the word "officers" in the statute is a word of familiar usage and is to be construed in accordance with the meaning given to it by the ordinary man. It said: "'Officers' normally means those who hold defined offices. It does not mean the boys in the back room or other agencies of invisible government, whether in polities or in the trade-union movement." It pointed out that the statute differentiates between "officers" and "agents" of labor organizations.

Respondent relies strongly upon *Goodman Manufacturing Co.* v. *N. L. R. B.*, *supra*, 234 F. (2d) 775, C. A. 7th, cert. denied, 352 U. S. 872, where it was held that "trustees" and "secretaries" of the International Union involved in that case were "officers" within the scope and intendment of Section 9(h) of the Act. This ruling by the Court of Appeals was subsequent to and with recognition of the ruling of the Supreme Court in the *Coca-Cola Bottling Co.* case. Having in mind the oft-repeated admonition that denial of certiorari is not to be considered as an affirmance of the ruling on the merits, we do not consider this case as in any way modifying the rule expressed in the *Coca-Cola Bottling Co.* case. The Court of Appeals distinguished the two cases by reason of their different factual situations, pointing out that Article V of the Constitution there being considered, as it related to the issue, was ambiguous which made it proper for the Court to resort to other provisions of the Constitution for the purpose of ascertaining the official authority or power bestowed upon "secretaries" and "trustees."

In the present case, Article VI dealing with International Officers is not ambiguous. It specifically describes them and further states "and no others." Applying the constitutional test, which was approved in *N. L. R. B.* v. *Coca-Cola Bottling Co., supra*, instead of the functional test urged upon us by respondent, the members of the International Executive Board, its Directing Committee, and Potash were not "officers" of the Union within the meaning of Section 9(h) of the Act.

The motion of the respondent to remand the case to the Board and its alternate motion to dismiss the petition are overruled.

IN THE UITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 12,328

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

LANNOM MANUFACTURING COMPANY, Respondent

MOTION TO REMAND CAUSE TO NATIONAL LABOR RELATIONS BOARD

Comes the Respondent, Lannom Manufacturing Company, and moves the Court to remand this cause to the National Labor Relations Board:

I

The Board erroneously excluded evidence offered by the Respondent that Irving Potash filled a position identified as an "office" in the Fur and Leather Workers Union, but had not filed the affidavit required under Section 159-H Title 29, U.S.C.A. The excluded evidence, which is in the record, reads as follows:

"Mr. Harwood: If the Examiner, please, Mr. Hamilton has very kindly consented to a stipulation

that will save the Examiner a lot of time and save the Respondent not only time but expense." . . .

. . . A. Mr. Irving Potash, at the meeting in June 1950, declined to surrender his card as a member of the communist party and prior to that time had been a vice-president of this union, and his activities were to supervise and in fact run and control the New York Furriers Joint Board. Rather than surrender his communist party, at that meeting, he gave up his title of vice-president, but that he retained his same job and performed the same duties; that he had been performing prior to giving up his title as a vice-president; . . . "

"Now, is that stipulation correct?

Mr. Hamilton: That is correct. General Counsel is willing to stipulate that if this witness were called he would testify as outlined by Mr. Harwood, but by entering into the stipulation General Counsel is not waiving any objections which he would and does make as to the materiality, relevancy and competency, admissibility and anything else on this testimony." . . .

. . . "Mr. Harwood: I would like to supplement one thing and say that Mr. Irving Potash who was referred to in the stipulation was one of the 11 communists who was a defendant in the rather notorious trial before Judge Medina and was convicted and is now serving time in the penitentiary.

Trial Examiner Wilson: All right. That stipulation will be received." . . . Record p. 52-54

" . . . Mr. Harwood: At this time, Mr. Examiner, I would like to get clear in my mind your ruling on the proof with reference to the communists connection with this Union. It was offered as a stipulation and was objected to by Mr. Hamilton and I never did understand whether you sustained his objection and it was entered an an offer of proof or whether you overruled his objection and it is in the record officially.

Trial Examiner Wilson: I will sustain his objection and allow the stipulation to stand as an offer of proof.

The Board sustained the ruling of the Examiner, excluding the foregoing evidence.

The excluded evidence was admissible to show that an officer of the charging union had not in fact signed the affidavit and the exclusion of this evidence was a denial of due process.

Wherefore, the Respondent, Lannom Manufacturing Company moves the Court to remand the case to the National Labor Relations Board with instructions to consider the excluded evidence.

Respectfully submitted,

JUDSON HARWOOD,
*Attorney for Lannom Manufacturing Company,*
*Respondent.*

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 12,328

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

LANNOM MANUFACTURING COMPANY, Respondent

SUPPLEMENTAL MOTION TO REMAND CAUSE TO THE NATIONAL LABOR RELATIONS BOARD

Since the Petitioner, National Labor Relations Board, has made assertions of fact which do not appear in the record of this cause in its memorandum in opposition to the original motion to remand, Respondent most respectfully files this Supplemental Motion in order that all of the pertinent facts may be before the Court.

I

The attached printed document entitled "Constitution of the International Fur and Leather Workers Union of United States and Canada 1950" is a true and correct copy of the Constitution in effect during all times here material.

II

The members of the International Executive Board, as provided in Article V, did not file the affidavits required by Section 9(h) of the Act, nor did the members of the Directing Committee of the International Executive Board, as provided in Section 12 of Article V, file such affidavits.

III

The position actually occupied by Irving Potash was that of Division President of the Fur Division rather than Vice-President, as stated in Respondent's offer of proof. The office of Division President is provided for under Article VI of said Constitution. Furthermore, Potash was also a member of the International Executive Board.

Since the members of the International Executive Board and the members of the Directing Committee of the International Executive Board did not file the required affidavits, and since said parties are officers within the meaning of Section 9(h) of the Act, the charging Union is not in complaince and the Board, therefore, does not have jurisdiction to entertain or prosecute this cause.

Respondent, therefore, respectfully moves the Court to remand the cause to the National Labor Relations Board, with instructions for the Board to receive and consider evidence that officers of the charging Union did not file the affidavits required under Section 9(h) of the Act.

Respectfully submitted,

JUDSON HARWOOD,
*Attorney for Lyonsom Manufacturing Company, Respondent.*

# IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 12,328

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

LANNOM MANUFACTURING COMPANY, Respondent

## OPPOSITION OF THE NATIONAL LABOR RELATIONS BOARD TO RESPONDENT'S SUPPLEMENTAL MOTION TO REMAND

To the Honorable, the Judges of the United States Court of Appeals for the Sixth Circuit:

Now comes the National Labor Relations Board, by its attorney, and requests that respondent's motion to remand the above-captioned cause to the Board be denied. In support of its request, the Board shows as follows:

1. Respondent's original motion to remand was predicated on the ground that the Board erroneously rejected respondent's offer of proof, made at the unfair labor practice hearing, that Irving Potash, a vice-president of the charging union, the International Fur and Leather Workers, was continuing to perform the duties of that position without having filed a Section 9(h) affidavit, and thus the complaint was invalidly issued. The Board opposed this motion on the ground, *inter alia*, that, since the Fur Workers' constitution did not list the office of International vice-president, no affidavit was required from the holder of that position.

2. Respondent's supplemental motion to remand alleges that there was noncompliance with Section 9(h) at all times relevant to the instant unfair labor practice case, in that:

(a) Article V of the union's 1950 constitution, a copy of which is annexed to the motion, provides for an International Executive Board and a Directing Committee of the International Executive Board, and the members of these boards failed to file Section 9(h) affidavits;

(b). Article VI of the constitution provides for the position of Division President of the Fur Division, and Potash was exercising the powers of that office without having filed an affidavit.

3. Respecting the facts alleged in paragraphs I-III of respondent's supplemental motion, the Board asserts that:

(a) The document annexed to the motion is a true copy of the union's constitution for the period relevant hereto;

(b) During said period, Section 9(h) affidavits were filed by each International officer listed in Article VI of the constitution; as follows:

International President—Ben Gold
International Secretary-Treasurer—Pietro Lucchi
President of the Fur Workers Division—Ben Gold
Secretary-Treasurer of the Fur Workers Division—Pietro Lucchi
President of the Leather Division—Augustus J. Tomlinson
Secretary-Treasurer of the Leather Division—Isidore Pickman

Members of the International Executive Board and the Directing Committee of the Executive Board, listed in Article V, did not file Section 9(h) affidavits except insofar as they were also an International officer as noted above.

4. Respondent's supplemental motion should be denied, for these reasons:

(a) Respondent's present contention goes beyond its original offer of proof before the Board, which merely alleged that President Ben Gold's Section 9(h) affidavit was false,[1] and that Potash was a "concealed" International vice-president. Since the present contention was not first presented to the Board, consideration thereof by this Court would appear to be barred by Section 10(e) of the Act. *N.L.R.B.* v. *Vulcan Forging Co.*, 188 F. 2d 927, 929-930 (C.A. 6); *N.L.R.B.* v. *Sheild Brown Mfg. Co.*, 213 F. 2d 163, 165-166 (C.A. 7).

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[1] This Court's prior dismissal of the cause on this ground (226 F. 2d 194) was set aside by the Supreme Court (352 U.S. 153).

(b) Even if not barred by Section 10(c), the question sought to be raised by respondent may not appropriately be litigated in an unfair labor practice proceeding. That is, the questions of whether the International Executive Board and its Directing Committee are offices under the union's constitution do not involve a legal issue as to the meaning of the terms used in Section 9(h), but merely a question as to the facts of compliance. The same is true of the contention respecting Potash's position as a concealed officer. As explained at pp. 3-4 of its opposition to respondent's original motion, the Board reads the applicable Supreme Court decisions as permitting such factual questions to be determined administratively rather than through litigation in particular unfair labor practice or representation proceedings.[2]

(c) In any event, respondent's contention that members of the Executive Board and its Directing Committee are required to sign Section 9(h) affidavits is without merit, for its amounts to substituting for the "constitutional test" of an officer the "functional test" which the Supreme Court rejected in *N.L.R.B.* v. *Coca-Cola Bottling Co.*; 350 U.S. 264. The Court there made clear that the term "officer" as used in Section 9(h) may be construed to mean "any person occupying a position identified as an office in the constitution of the labor organization," as distinguished from other members of the union who, "though effective instruments of its policies," do not "fill the offices designated by their organization's constitution" (350 U.S. at 268).

Article VI of the instant constitution lists the International officers of the Fur Workers as noted in "3" above, and concludes with the phrase "and no others." The Executive Board and its Directing Committee are provided for in the entirely separate Article V. Article V makes the International officers enumerated in Article VI members of the Executive Board by virtue of their offices, and speaks of the remaining members of the Executive Board

[2] The Board stated in its Decision and Order herein (103 NLRB 847, fn. 2) that it was "administratively satisfied that the Union was in compliance with Section 9(h) at all times relevant hereto."

as "non-officer" members. In these circumstances, as the Board has recognized in other similar situations, the Executive Board cannot be regarded as an office under the constitutional test. See *General Shoe Corporation*, 109 NLRB 618-619; *Crown Upholstering Co.*, 110 NLRB 22, 23-24; *The Dunleavy Company*, 114 NLRB 1589-1590. As the Board recently added in rejecting a related contention in *Ekco Products Co.*, 117 NLRB No. 31: "When, as here, a union constitution expressly limits the designation of its officers to President, Secretary-Treasurer and Vice President, it would be a fanciful extension of the term, unwarranted by its ordinary meaning, to hold that Tellers, Delegates to CIO Conventions, the National Director for Canada and District Officers are also officers because they too are elected or perform prescribed duties."

Nor does *Goodman Mfg. Co.* v. *N.L.R.B.*, 234 F. 2d 775 (C.A. 7), require a different conclusion. In that case, there was some basis for believing that the constitution was ambignous in its designation of officers, for the "trustees" and "secretaries" in question were lumped in the same section of the constitution with other admitted officers of the union. The constitution here, as just shown, leaves no room for doubt, making a clear distinction between officers on the one hand, and the Executive Board on the other hand. Moreover, for the reasons given in its *Ekco* decision, *supra*, the Board believes that the Court in *Goodman* exceeded the permissible limits of the constitutional test approved by the Supreme Court in *Coca-Cola*, *supra*.

Wherefore, it is respectfully submitted that respondent's supplemental motion to remand should be denied.

(S.) STEPHEN LEONARD,
*Associate General Counsel,*
*National Labor Relations Board.*

FEBRUARY, 1957.

# IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 12,328

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

LANNOM MANUFACTURING COMPANY, Respondent

## ALTERNATIVE MOTION TO DISMISS

Comes the Respondent and respectfully moves the Court to dismiss the Petition filed by the National Labor Relations Board in this cause because the record before this Court, including the admissions contained in the Board's Memorandum in opposition to Respondent's Supplemental Motion to Remand, shows, without dispute, that a large number of persons occupying positions identified as offices failed to file the affidavits required by Section 9 (h) of the Act.

*Solicitor for Respondent.*